PENOBSCOT NATION'S SUPPLEMENTAL PUBLIC COMMENTS ON MAINE'S APPLICATION FOR APPROVAL OF WATER QUALITY STANDARDS FOR APPLICATION WITHIN THE PENOBSCOT INDIAN RESERVATION

November 25, 2013

The Penobscot Nation, through counsel, hereby submits supplemental public comments on the State of Maine's request that its revised water quality standards (WQSs) for arsenic, acrolein, and phenol be approved for application in Indian territories in Maine under the Clean Water Act (CWA). Because of the importance of these issues, we ask that these comments be made part of the EPA's record.

For reasons already set forth in the Nation's initial public comments, the EPA should deny Maine's application because Congress has not granted the State of Maine authority to set acceptable cancer risk rates or fish consumption rates for Penobscot tribal members exercising their aboriginal right, confirmed by Congress, to take fish from the Penobscot River for their sustenance. Absent an unequivocal allocation of such authority to the State by Congress – and there is none in the Maine Indian Claims Settlement Act of 1980 – that authority resides with the federal government and the Tribe. A purported delegation of such authority to Maine would violate the EPA's constitutionally-based trust responsibility to the Tribe. Furthermore, by the express terms of the Settlement Act, such matters cannot be regulated by Maine because they are "internal tribal matters," which are not subject to regulation by the State.

These supplemental comments reinforce these points. More importantly, they confirm in no uncertain terms that (1) the Penobscot tribal members' sustenance fishery in the Penobscot River must be protected as an "existing use" and as a "designated use" under the CWA and (2) Maine's application must be rejected because it fails to recognize and protect those uses.

I. Sustenance fishing by Penobscot Nation tribal members in the Penobscot River is an existing use that Maine's WQS application fails to recognize or protect.

"Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards." 40 C.F.R. § 131.3(e). "An 'existing use' can be established by demonstrating that . . . fishing, swimming, or other uses have actually occurred since November 28, 1975; or that the water quality is suitable to allow the use to be attained unless there are physical problems, such as substrate or flow, that prevent the use from being attained." EPA WATER QUALITY STANDARDS HANDBOOK, Chapter 4 § 4.4.

The Penobscot tribal members' reliance upon the Penobscot River for a sustenance fishery is such an existing use, both as a factual matter and as a matter of law.

Penobscot tribal members have always relied upon fish, fresh water clams, and eel from the Penobscot River for their subsistence. *See* Frank G. Speck, PENOBSCOT MAN (1940) at 82-91. As of November 28, 1975 and continuing thereafter, members of the Penobscot Nation continued such reliance. *See* Affidavit of Christopher B. Francis, attached hereto as Exhibit A. As of that date and thereafter, Penobscot families residing at Indian Island, the Tribe's principal reservation island, relied upon these food sources for 3 to 4 meals per week, consuming 2 to 3 pounds of these food sources at each meal. *Id*. Thus, as a factual matter, this is an existing use, requiring protection under the CWA.[1]

[1] The situation at the Penobscot Nation is not dissimilar to that at other tribes, traditionally dependent upon a subsistence fishery. As this Agency concluded in studying fish consumption rates at such tribes in the Northwest, there is "a simple relationship between tribal fish-consuming populations in the Pacific Northwest; people eat what's available to them, what's culturally preferred and at high consumption rates." EPA, TECHNICAL SUPPORT DOCUMENT FOR ACTION ON THE STATE OF OREGON'S NEW AND REVISED HUMAN HEALTH WATER QUALITY CRITERIA FOR TOXICS AND REVISIONS TO NARRATIVE TOXICS PROVISIONS SUBMITTED ON JULY 8, 2004 (June 1, 2010) at 47, available at http://www.epa.gov/region10/pdf/water/oregon-hhwqc-tsd_june2010.pdf.

Congress established it as such as a matter of law in 1980 upon enacting the Maine Indian Claims Settlement Act. Congress clearly understood the reliance of Penobscot tribal members upon the River fishery as a food source and intended to protect it. Thus, it expressly confirmed that the Tribe's members have the right to use the River to take fish for their individual sustenance, 25 U.S.C. §§ 1721(b), *ratifying* 30 M.R.S.A. §§ 6206(1), 6207(4), and through its authoritative final committee reports on the Settlement Act, Congress confirmed that this was an "expressly retained sovereign activity." S. Rep. No. 96-957, at 14-15; H. R. Rep. No. 96-1353, at 14-15. Attendant to this confirmed existing use of the Penobscot River by Penobscot tribal members as a sustenance fishery is the right to water in sufficient quantity, and of sufficient quality, to preserve the use. *See United States v. Adair*, 723 F.2d 1394, 1408-11, 1414-15 (9th Cir. 1983); *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658, 676, 679 (1979); *Winters v. United States*, 207 U.S. 564 (1908).

In short, both as an empirical matter and as a matter of law, post-November 28, 1975, there has been an existing use of the Penobscot River as a sustenance fishery for the Penobscot Nation, requiring healthy fish for a significant portion of the diet of tribal members.

The CWA and its implementing regulations require that "existing instream water uses and the level of water quality necessary to protect the existing uses *shall be maintained and protected*." 40 C.F.R. § 131.12(a)(1) (emphasis added); 33 U.S.C. § 1313. The State fails to establish that its proposed water quality standards protect the Penobscot Nation's sustenance fishery, and the EPA owes the Tribe a trust duty to ensure that they do so.

Were the EPA inclined to approve Maine's proposed WQS on the ground that a precise fish consumption rate of tribal sustenance fishers has not been established, such action would plainly be in error. First, the EPA is well aware of the Wabanaki Exposure Scenario, which

provides a "sound scientific rationale" regarding fish consumption rates by tribal members' existing sustenance use protected by the Settlement Act, and, therefore, protected by the CWA. 40 C.F.R. §§ 131.11(a)(1), (b)(1)(iii). Second, the testimony of Penobscot tribal member, Christopher B. Francis, attached hereto, provides empirical data pertaining to that consumption rate. *See also* EPA WATER QUALITY STANDARDS HANDBOOK, Chapter 4 § 4.4 ("[A]n aquatic protection use 'exists'" whether or not "someone succeeds in catching fish."). Thus, the "existing use" of tribal sustenance fishing is well-established, and the Agency needs no further data, such as the amount of fish that tribal members have succeeded in catching and consuming, to require its protection.

But even if such data were lacking, the EPA would abrogate its trust responsibility to the Penobscot Nation if it did not do the work necessary to obtain such data because it has a duty to protect what Congress confirmed as the "expressly retained sovereign activity" of Penobscot tribal members to take fish from the Penobscot River for their sustenance.

By its application, Maine arbitrarily sets tribal fish consumption rates based on data from a study that was conducted by state fishing-license holders. This must be rejected by the EPA because it is an entirely flawed methodology. First, individuals holding state fishing licenses cannot possibly be likened to individual members of a unique tribal community that depend upon River resources as a food sources. Second, tribal sustenance fishers are not required to hold state licenses to fish within Indian territories. So the conduct of state license holders says nothing about the conduct of tribal members who fish for sustenance. Thus, Maine's "study" cannot serve as the basis for water quality standards specifically applicable within the Penobscot Nation's sustenance fishery. It would be arbitrary and capricious for the EPA to approve water quality standards in that fishery in accordance with Maine's deeply flawed approach to

ascertaining tribal fish consumption rates while ignoring the Wabanaki Exposure Scenario and the testimony of actual tribal members engaged in the use of the River for sustenance fishing.

Beyond this, Maine's proposed WQS, if approved by the EPA for the Penobscot Nation's reservation fishery in the Penobscot River, would allow increased levels of arsenic, acrolein, and phenol to be released into that fishery above current restrictions. This would both increase the cancer risk for sustenance fishers, and reduce the amount of fish that they could safely consume. EPA should take notice of the fact that Penobscot tribal members engaged in sustenance fishing already face unacceptable cancer risks, with rates of cancer that are much higher than those of the State's general population. Thus, approval of Maine's WQS is tantamount to exposing a subsistence tribal member fishing population to higher cancer risks for engaging in an existing use that is supposed to be protected under the CWA and the federal trust responsibility to the Penobscot Indian people.

Given these significant deficiencies in Maine's application to apply its WQS to the Penobscot Nation's reservation fishery, the EPA should reject the application.[2]

[2] The EPA should not approve Maine's WQS without adequate consideration of not only the existing, empirical evidence of the Penobscot members' use of the sustenance fishery since November 28, 1975, but also the suppression of that use due to the polluted state of the River. The foregoing discussion has focused on the former. With respect to the latter, Maine provides no analysis of suppressed fish consumption rates for Penobscot tribal members. Given the existing use and the likely suppression of it, the EPA should develop the missing analysis; indeed, it has a trust responsibility to do so. At the very least, the EPA should use the available methodologies to account for the suppression of tribal subsistence fishers in Oregon and elsewhere. *See, e.g.*, WASHINGTON DEPT. OF ECOLOGY, FISH CONSUMPTION RATES TECHNICAL SUPPORT DOCUMENT: A REVIEW OF DATA AND INFORMATION ABOUT FISH CONSUMPTION IN WASHINGTON (September, 2011) at 96, 107-108 (and sources cited therein), provided herewith as Exhibit B.

II. Tribal sustenance fishing is a designated use within Indian territories that Maine's WQS application does not recognize or protect.

Quite apart from its status as an existing use, the Penobscot Nation's sustenance fishery is a designated use, requiring protection under the CWA.

"Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained." 40 C.F.R. § 131.3(e). "Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the water of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. § 131.3(i). As described above, Congress confirmed the right of the Penobscot Nation to have a sustenance fishery in the Penobscot River with water of a sufficient quantity and quality to support that use. 25 U.S.C. § 1721(b), *ratifying* 30 M.R.S.A. §§ 6206(1), 6207(4); *United States v. Adair*, 723 F.2d 1394, 1408-11, 1414-15 (9th Cir. 1983); *Washington v. Washington State Commercial Passenger Fishing Ass'n*, 443 U.S. 658, 676, 679 (1979); *Winters v. United States*, 207 U.S. 564 (1908). This federally protected fishing right is therefore a "Federal law which consist[s] of a designated use or uses for the waters [within the Penobscot Indian territories] and water quality criteria for such waters based upon such uses," 40 C.F.R. § 131.3(i).

Designated uses must be protected even if they have yet to be attained. The EPA must therefore utilize (a) fish consumption rates provided by the empirical testimony of Penobscot tribal members coupled with those outlined in the Wabanaki Exposure Scenario, accounting for suppression, and (b) cancer risk rates that are adequately protective of tribal sustenance fishers. As discussed above and in our previous filings, the State's proposed standards do not include criteria that protect the designated water use of sustenance fishing in the Penobscot Indian territories. Thus, Maine's application should be rejected. *See* 40 C.F.R. §§ 131.5(a)(2), 131.6, 131.10.

III. Regulation of the Penobscot sustenance fishing right is an internal tribal matter.

In its proposed numeric WQS for arsenic, acrolein, and phenol exposures within the Penobscot Nation's reservation fishery, Maine purports to substitute its own normative policy decisions for those of the Penobscot Nation: namely, what the appropriate cancer risk rate and fish consumption rates should be for tribal sustenance fishers. These are internal tribal matters that Maine has no authority to impose upon the Tribe.

As EPA recognizes, these decisions are "risk management decisions," not decisions based on scientific data. *See* EPA METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH, §2 (2000). As such, they are grave decisions for a government representing the unique interests of its tribal citizens to decide; they involve the health and welfare of the Penobscot Indian community and its aboriginal connection to the River upon which it relies for sustenance. Maine has no authority to usurp policymaking authority over these matters in substitution for the Penobscot's tribal government. *See* 25 U.S.C. §§ 1721(b), *ratifying* 30 M.R.S.A. §§ 6206(1) (state may not regulate "internal tribal matters"), 6207(4) (Nation has exclusive jurisdiction over sustenance fishing, other than limited residual authority granted to Maine).[3]

[3] That such matters are "internal tribal matters" is reinforced by the federal and state governments' adoption of the principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes the necessity of respecting the distinctive relationships between indigenous peoples, including Native Americans, and their traditional reliance upon land and natural resources in their territories. *See* UNDRIP Article 25; *see generally id.* Articles 1-46. The United States adopted UNDRIP on December 16, 2010 and the State of Maine did so on April 15, 2008.

CONCLUSION

For the reasons set forth in the Nation's submission of September 13, 2013 and those set forth above, the EPA should decline to approve Maine's proposed WQS within the Penobscot Nation's sustenance fishery on the Penobscot River.

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